NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KELVIN MOORE, Plaintiff-counter-defendant - Appellant, v. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, employee benefit plan, Defendant-counter-claimant - Appellee.	No. 07-55139 D.C. No. CV-05-01180-AHS MEMORANDUM [*]

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted May 7, 2008 [**]
Pasadena, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: FISHER and PAEZ, Circuit Judges, and ROBART, District Judge.[***]

Former professional football player Kelvin Moore appeals from the district court's grant of summary judgment in favor of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan"). The district court granted the Plan's motion for summary judgment, concluding that the Plan's Retirement Board ("the Board") did not abuse its discretion in terminating Moore's claim for disability benefits. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand.

The Plan gives the Board full discretionary authority to construe the terms of the Plan and to determine eligibility for benefits. We therefore review for abuse of discretion the Board's decision to terminate Moore's benefits. *See Hamilton v. Wash. State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1102 (9th Cir. 2006); *Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173, 1178 (9th Cir. 2005).

Here, Moore's impairment was described as "serious" or "significant" by the physicians who examined him, one of whom specifically noted that a vocational expert was needed to determine the type of employment Moore could attempt in light of his limitations. Even if this physician's suggestion could be disregarded,

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[***] The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

see Boyd, 410 F.3d at 1179, the medical evidence is unanimous that Moore's symptoms are "quite disabling in his day to day activities since he is unable to sit or stand for any length beyond one to two hours" and that he is "significantly limited in his residual functional capacity." On this record, it is not clear whether there is "any occupation or employment for remuneration or profit" that Moore could perform.

Although "consideration of vocational evidence is unnecessary where the evidence in the administrative record supports the conclusion that the claimant *does not have an impairment* which would prevent him from performing some identifiable job," *McKenzie v. Gen. Tel. Co. of Cal.*, 41 F.3d 1310, 1316–17 (9th Cir. 1994) (emphasis added), the record in this case does not demonstrate that

consideration of vocational evidence was "unnecessary."[1] *See id.* (adopting the principle that this court decides "on a case-by-case basis, whether under the particular facts the plan administrator abused its discretion by not obtaining the opinion of a vocational rehabilitation expert"), abrogated on another issue by *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863 (9th Cir. 2008). In the absence of vocational testimony that there was, in fact, a job that Moore could perform given his substantial impairments, the Board's decision to terminate Moore benefits was not "based upon a reasonable interpretation of the

[1] We respectfully disagree with the dissent that "Moore never offered or demanded vocational testimony before the Board or on appeal." Dissent at 7. Before the Board, the physicians that examined Moore commented on the need for vocational evidence both directly and indirectly by noting that Moore required "modifications" to any employment he might attempt. In our view, this sufficiently raised the issue for the Board's consideration. And, in any event, the Board never offered Moore a chance to "offer" vocational testimony because the letter terminating Moore's benefits did not give him "[a] description of any additional material or information" that was "necessary" for him to "perfect the claim," in violation of 29 C.F.R. § 2560.503-1(g). Moore nevertheless raised the issue in his appeal letter to the Board when he argued that his substantial impairments "prevented [him] from working or pursuing a career." Nor did Moore subsequently abandon this issue. On appeal before the district court and before us, Moore pursued the issue when he argued that the Board had failed to "identif[y] realistic employment opportunities within the marketplace that could actually be performed by Moore . . . given the significant problems he has experienced for nearly four years post-injury."

[P]lan's terms." *See Boyd*, 410 F.3d at 1178 (quotation removed).[2] Moore's claim that California state law applies to his claim, however, is without merit.

We reverse and remand to the district court with instructions to remand to the Plan for consideration of appropriate vocational evidence, including but not limited to the opinion of a vocational rehabilitation expert.

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[2] We respectfully disagree with the dissent that our reading of *McKenzie* transforms it "into a single-factor test in which vocational testimony is required . . .." Dissent at 1. Nor does the dissent's discussion of *McKenzie* or *Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1455 (D.C. Cir. 1992), persuade us on this question. These cases are easily distinguished because neither the claimant in *McKenzie* nor the claimant in *Block* was substantially impaired. *See also Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1309 (5th Cir. 1994) (concluding that vocational evidence was not required where "Duhon was a sixty-five year old man in overall good health with a high school diploma and moderate restrictions on his physical ability."). McKenzie was a "highly educated" fifty-two-year-old person "[with] a slight impairment . . . [who] appears healthy and normal." *McKenzie*, 41 F.3d at 1317–18. The record in that case supported the conclusion that "McKenzie not only could work at other occupations which did not involve heavy exercise, but he may even be able to work at his old occupation." *Id.* at 1318. In *Block*, the court explained that Block's "medically-indicated limitations . . . were not [] great" and that "medical evidence indicated that Block could fill a sales position involving desk and telephone work, some walking, driving, and visiting with clients." 952 F.2d at 261. In fact, the issue in *Block* was whether the plan had to rebut with vocational evidence Block's contention that the "sales positions in the D.C. area for which Block could qualify were *scarce*." *Id.* (emphasis added). Contrary to the dissent's analogy, this case is not like *Block* because the medical evidence in *Block* demonstrated that Block could "fill a sales position" for which he was already trained. There is no such evidence here—the issue is whether Moore can do *any* job in light of his undisputed and substantial impairments, not whether a *job* for which Moore was qualified might be readily available.

REVERSED AND REMANDED, with instructions.